

REGULATION, THE REGULATORY STATE AND EUROPEAN POLITICS

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The term ‘regulatory state’ entered the vocabulary of students of European Politics over twelve years ago with the publication, in West European Politics, of Giandomenico Majone’s seminal ‘The rise of the regulatory state in Europe’ (Majone 1994).¹ Underlying Majone’s argument was the diagnosis of two key trends, one being an overall shift towards the use of legal authority or regulation over the other tools of stabilisation and redistribution, the other the European Commission’s expansionist role through the use of influence over policy content in the face of an absence of other, especially budgetary tools (see also Majone 1997a). Since then, it has become commonplace to state that we live in the age of the regulatory state, characterised by privatisation of public services, the establishment of quasi-autonomous regulatory authorities and the formalisation of relationships within policy domains (see Loughlin and Scott 1997, Moran 2002).

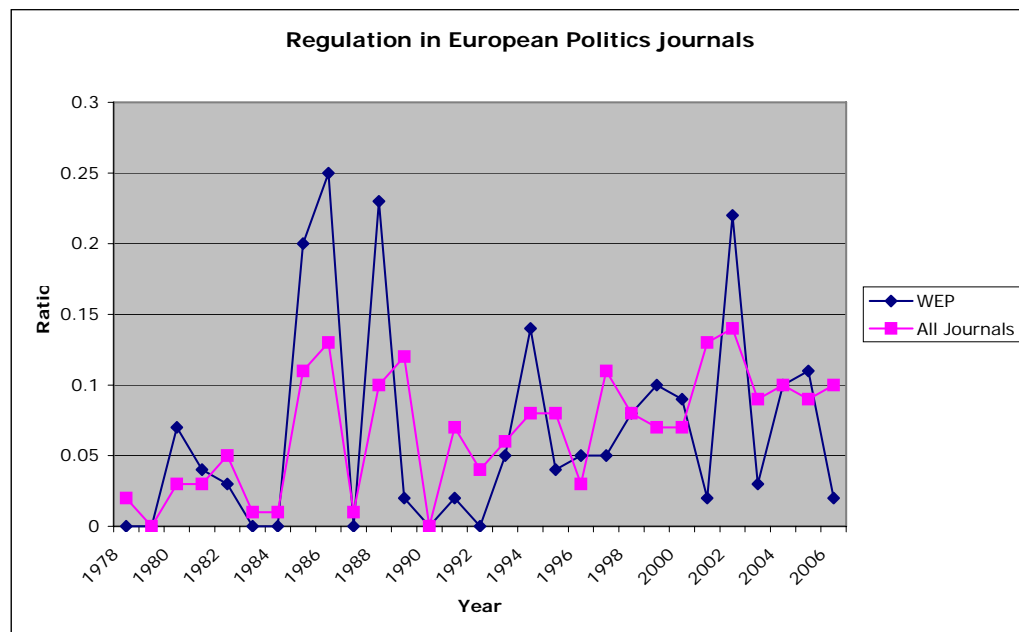
In many ways, the field of regulation could be said to have witnessed a process of institutionalisation over the past two decades. Interest in regulation has moved from an initial curiosity in the impact of technological change, to the policy trend of the selling-off of public sector assets to the wider implications of the regulatory state for the organisation and nature of the state in itself. Other signs of the institutionalisation of regulation as part of the standard menu of political science have been the emergence of text books and edited volumes (Ogus 1994, Baldwin & Cave 1999, Black *et al.* 2005, Jordana and Levi-Faur 2004, Coen and Heritier 2005), the creation of postgraduate programmes and research centres, as well as, inevitably, the establishment of a journal with ‘Regulation’ in its title (‘Regulation & Governance’).

A rough count of individual articles points to an increase in absolute numbers of articles devoted to policy issues related to the regulatory state, although when seen in the context of an overall increase in articles within this subfield the trend is somewhat less impressive. Table 1 charts the trend of regulation-related articles as a ratio of the total number of articles published in each calendar year since the inception of West European Politics. It looks at West European Politics on its own and at the overall trend by including, besides West European Politics, also the European Journal of Political Research, Journal of European Public Policy, Journal of Common Market Studies, and European Union Politics.²

¹ According to ‘google scholar’, the article has been cited 224 times (last accessed: 24 April 2007).

² JEPP articles since 1997 were included given the absence of electronic searches for its earlier volumes. WEP articles for the period up to 2002 were taken from the 25 year index. Governance and Public Administration were excluded as they are not European politics journals per se, their inclusion is likely to have increased the representation of ‘regulation’ in the overall population of articles. The peaks are attributable to special issues. The annual review of the EU volume of JCMS was excluded from the analysis.

Table 1



This paper enquires into four broad concerns. First, what are the sources of this supposed rise of the regulatory state in Europe and does it represent a distinct policy development? Second, what has been the ‘value added’ in terms of empirical and analytical insights for the study of European Politics (and more broadly, Comparative Politics)? Third, does the age of the regulatory state constitute a new age of stability of the state in Europe? Fourth, and in conclusion, what is the future of (the study of) regulation?

The rise of the regulatory state in European Politics

As already noted, the emergence of the regulatory state in Europe has been linked to two developments. One is the diagnosed exhaustion of the ‘positive’ welfare state and the subsequent move towards the use of authority rather than the ‘cheque book’ as preferred policy tool at the national level. The other is the attempts by the European Commission to maximise its influence over policy content given the absence of other substantial discretionary resources, and also the interest of member states in transnational policy responses to issues arising from the Single European Market. As a result of these two sources of change, member states are said to have embarked on three interrelated policy choices: the privatisation of activities formerly undertaken as part of state ownership, the emergence of quasi-autonomous agencies with quasi-legislative powers responsible for the economic regulation of private (-ised) activities, and the formalisation and contractualisation of relationships within the regulated policy domain. Linked to this formalisation has also been the growing presence and importance of EU legislation for the provision of public services, for example, for public tendering procedures or the cross-subsidisation of public services.

The diagnosed ‘rise of the regulatory state’ has therefore important implications for the study of European Politics, for at least three reasons. First, policy developments such as the privatisation of essential ‘infrastructures of power’ are important given

that these industries (telecommunications, electricity, railways, gas and water) have been widely seen as essential aspects of the modern state at least since the days of Max Weber. More broadly, the rise of the regulatory state in the form and instruments of the late 20th century could be seen as a further extension of the powers of the state in the sense of ‘standardisation, quantification, [and] public reporting’ (Moran 2003: 7). Second, the establishment of regulatory agencies as separate and non-majoritarian parts of the state does not merely constitute a reallocation of power and a shuffling around of the institutional furniture of the state, but also has wider implications for the nature of liberal democracy, given that this implies an increased prominence for non-majoritarian politics. Third, the formalisation of relationships within the regulated policy domain suggests a reduction in the discretionary powers of the national level of government, due partly to the importance of European law within the national context, and partly to the role of private (profit-oriented) actors in providing public services. What have been the conditions for this perception of a rise of a regulatory state in Europe? And do the claims of a rise stand up in light of historical developments, both in the European or the international context? The rest of this section considers these two questions.

The conditions for the suggested contemporary rise of a regulatory state can be summarised by three factors: disappointment, strategic choice given structural constraints, and habitat change. Disappointment relates to the experience of the inability, at the macro-level, of the welfare state to achieve desired policy outcomes; at the micro-level, it points to the perceived failure of control over state-owned enterprises. Relationships between ministers/ministries and state-owned enterprises were said to have failed due to accusations of cheating, whether in terms of continuous political interference in managerial decision-making or in terms of control evasion by the services providers, or through simple ‘capture’ (Majone 1996a: 11-15, Tivey 1982). Strategic choices in the light of these experiences of control ‘exhaustion’ via state ownership were also guided by the ‘reality’ of fiscal constraint, making a policy approach that shifts the costs of ‘implementation’ to third parties particularly attractive. In other words, the costs of deciding on rules as well as on monitoring and sanctioning are significantly less than the costs incurred by the regulated party that is required to alter its behaviour (or production process). In addition, ‘delegation’ to regulatory agencies has also been interpreted as a method of shifting blame away from politicians and towards ‘defenceless’ regulators as well as regulated companies (see Thatcher and Sweet Stone 2002). However, if such a blame-shifting strategy has indeed been present, then it arguably failed spectacularly in the UK, leading to a breakdown of the initial regulatory bargain between regulator and political system, with wider implications for the study and ‘state’ of the regulatory state in Europe.

Strategic choices within structural constraints have been a dominant theme in accounting for the emergence of the European Commission as an important party in regulatory policy-making. As already noted, the European Commission’s interest in governing through rules requiring (costly) transposition and implementation in member states was one central part of Majone’s original account. At the same time, member state governments were similarly interested in the ‘supply’ of EU-level provisions, largely in order to prevent electorally costly ‘races to the bottom’ in terms of social and environmental regulatory standards as part of competition across jurisdictions within the Single European Market, but also in order to reduce the costs (to their national industries) of segmented national markets and to impose their own

national solutions on other countries in order to minimise adjustment costs for their own industries. While, therefore, the emergence of rule systems at the supranational level was one source for the growing interest in regulation, the interaction between the EU- and national level provided for another. Transposition of rules in economic, environmental and social policy domains further facilitated the prominence of regulation as a policy tool and as a subject in search of academic interest, both in terms of rule change and in terms of rule accommodation within national systems.

Underlying the arguments diagnosing the rise of a regulatory state are more far-reaching ‘habitat’ changes. Similarly to the argument that climate change has wiped out dinosaurs and is about to wipe out polar bears³, changes in the international economy are said to have challenged traditional forms of social control and to have increased the potential benefits and costs of institutional choices (see Lodge and Stirton 2006). Majone (1996b) has suggested that the internationalisation of the economy and, more importantly, the increasing complexity of the modern economy have placed particularly prominence on states to tackle the problem of ‘credible commitment’. This problem arises from the ‘time inconsistency’ problem that is inherent to politics (as well as any other form of social relationship): governments face difficulties in providing safeguards that will protect benefit flows to constituents over time, in particular following changes in government.⁴ This commitment problem arises in particular from the need of states to attract private investment to address large-scale modernisation issues (for example, in telecommunications infrastructure). Private investors will demand, so the argument goes, a particular risk surcharge in order to ‘insure’ themselves against the risk of political and administrative expropriation (for example through the imposition of social or environmental regulation) once the sunk investment has been made (see also Levy and Spiller 1994, Horn 1995). In political contexts characterised by ‘veto players’⁵, non-majoritarian regulatory institutions provide a credible commitment device as they promise focused decision-making by experts rather than ‘amateurs’ in ministerial departments and a logic of decision-making that is dominated by policy rather than political motives. In Westminster systems, i.e. those where an ‘elective dictatorship’ is able to legislate on regulatory agencies without any major political constraint, a strategy of ‘agencification’ is not credible. Hence, alternative devices, for example licences, are required to provide for commitment.⁶ In short, the institutional expressions of the ‘regulatory state’ as diagnosed by Majone and others are explained as strategic choices to signal ‘credible commitment’ to private investors, with a variety of institutional ‘architectures’ reflecting strategies to deal with the ‘credible commitment’ problem in different political institutional systems.

³ One political failure has been the failure to internalise costs for air traffic through regulation. Would the appropriate costing of air traffic have reduced the amount of pointless academic conferences held in attractive locations?

⁴ The problem has therefore also been termed coalitional or political drift.

⁵ This modern parlance is used to comply with the contemporary logic of appropriateness. It will now therefore also cite Tsebelis (2002). More helpful would be ‘a system with many powerful political actors’.

⁶ Gilardi (2002: 878) finds that empirically, the lower the number of ‘veto players’, the greater the extent of ‘independence’. This finding is in line with the lack of credibility of ‘low veto point’ systems, namely that given the lack of credibility, systems need to respond by creating (the illusion of) greater organisational distance.

A variant of the above ‘habitat’ explanation points to the internationalisation of the economy as a source for the emergence of the regulatory state. Michael Moran (2003), for example, has suggested that the internationalisation and the social heterogenisation of the British economic elite has led to a part-collapse of traditional forms of ‘club government’ in which control was exercised through social norms and peer-pressure. Such a world of informal control was also challenged by developments that Michael Power (1997) has diagnosed in his ‘audit society’ argument, namely that in a world of decreasing trust in experts and authority, programmatic ideas such as ‘audit’ are utilised to offer an illusion of assurance and control, often with tragic consequences (see also Rose 1994). In an even wider sense, a link can be drawn between the rise of an interest in regulation and the ‘risk society’ in which a society that anticipates and witnesses humanly created risks produces as a response a ‘regulatory society’ - with potentially disastrous consequences as rhetorical attempts of ‘control’ raise social expectations of control exactly at the same time in which social heterogenisation reduces collective identities and therefore problem-solving possibilities: We demand more hierarchical intervention exactly when the conditions for hierarchical intervention are no longer present.

So far, so normal: the interest in regulation and the regulatory state points to important contemporary phenomena. However, in order to qualify as a ‘new’ area of interest it needs to be shown that it represents a genuine ‘new’ development, either in Europe or in the wider international context. For example, Cento Veljanovski (1991: 4), argued that ‘regulation is the border between the state and industry’, representing the new ‘battleground’ in how the economy should be run (see Lodge 2002a: 176). As historical studies of regulation have shown, regulation has been a ‘battleground’ between the state and industry since at least the 19th century, for example, in the economic regulation of the railways (see Lodge 2002a, Dobbin 1994, Moran 2003). Inspection, *Aufsicht* and licensing have been long-standing parts across European public administration over the centuries and debates on how to conduct control go to the heart of unresolved debates in the field of public administration. The railways’ safety provisions are widely seen to have been one of the key triggers for the ‘growth in government’, at least in the case of Britain (MacDonagh 1958, Parris 1965). In addition, in the age of state ownership, the ‘godfather’ of public corporations (in Britain), Herbert Morrison, suggested (in 1947) that eventually ‘the minister’s functions become more regulatory and supervisory in character’.⁷ In other words, the technocratic dream of ‘rational control’ through depoliticised regulation instead of meddlesome organisation has been a recurring theme across the ages.

If regulation is therefore hardly a new idea in the study of European states, then it could nevertheless be argued that the ‘newness’ of contemporary regulation lies in the emergence of quasi-independent regulatory agencies on the lines of the United States and its regulatory commissions. However, the trends discussed above hardly represent a ‘catching up’ on the US by European states, in the sense of European states witnessing problems that the US was exposed to nearly a century earlier and which triggered the emergence of a ‘regulatory state’. In brief, the dynamics of the growth of the US administrative (regulatory) state represented responses, first, to the increased perception that a country governed by ‘parties and courts’ could not sufficiently deal with the increases in corporate power, and therefore required free-standing regulatory

⁷ H. Morrison, *Taking Stock*, PRO MT 47/15, S.I. (M) (47) (32), 18 July 1947

agencies (the ‘progressive era’); second, to the perils of economic depression and subsequent aspirations to provide for conditions for competition to take place (the ‘New Deal era’); third, to the perception that market failures in the social and environmental field required regulatory activities (the ‘new social regulation’ era); and, fourth, to the perception that regulation was inherently associated with ‘big government’ and pathological policy outcomes (the ‘deregulatory’ era) (Glaeser and Shleifer 2001, Eisner 2000). Apart from different dynamics between European and US experiences, the institutional furniture of the European regulatory state, at least in the British case, represented an explicit rejection of the US experiences, despite the similarity of establishing free-standing regulatory offices. Taking the British case as an example, the initial choices in terms of price control (RPI-X; instead of ‘rate of return’ regulation) as well as single leadership (‘director general’, instead of boards) were taken in order to avoid what was perceived to be pathologies of the US regulatory process.

What unites European and US accounts is the diagnosed advocacy of regulation as a presumably technocratic and professional method of controlling social processes vis-à-vis the ‘dirty’ world of politics and business.⁸ But the underlying processes that have led to the politics of regulation over the past three decades have been distinct. Even if one wants to draw similarities, then the case of the emergence of regulatory agencies in the 1980s-1990s across European states and the 1880s-1910s in the US seem to be a case of similar devices adopted for different motives. It is similarly questionable whether the dynamics of US federal-state relationships (Teske 2004) in the development of multi-level regulation can be read-across to the level of EU-national systems relationships, despite the potential argument that in both cases these debates are driven by criticism of the legitimacy of the federal or the EU-level as an appropriate source for regulation. And the debates over the past two decades have seen ‘regulation’ largely as an outcome of a ‘hollowing out’ of the European state rather than as part of a problem of a (US-type) ‘big government’.

The diagnosed rise of the regulatory state should therefore be seen within a historical context in which many arguments regarding the organisation of the state are being recycled and relived. The structural choices said to characterise the ‘regulatory state’ have important implications for the idea and nature of states in Europe. In addition, the conditions in which these debates take place have important implications for the study of European Politics, as it centrally affects both aspects associated with the inherent idea of the (liberal democratic) state as well as the (institutional) space in which politics is taking place, across and between levels of government organisation.

European Politics and the Study of the Regulatory State

The study of regulation in the broad field of European Politics has been largely concerned with four, interrelated fields, pointing, on the one hand, to an interest in the EU or the national level of analysis, and, on the other hand, to an interest in either the organisation of the ‘regulatory state’ (agencies and the wider institutional furniture) or processes of regulatory change. These four perspectives on the politics of the

⁸ The idea of ‘regulation’ as a mechanical process is arguably rooted in its etymology. Regulation emerged in the English language around 1630, drawing on the Latin *regulare* (‘to control by rule’) and *regula* (‘law’), a *regulator* was established in 1687 as a member of a commission to manage county elections. By 1715, ‘regulation’ was defined as ‘rule for management’ and, by 1758, a ‘regulator’ was a ‘clock by which other timepieces are set’ (see www.etymonline.com).

regulatory state in Europe are illustrated in Table 2. Apart from the search for the mechanisms that explain the emergence of a ‘regulatory state’ at the EU-level, most of the literature has been largely concerned with establishing degrees of increasing similarity (‘convergence’) or differences across member states in the light of similar sounding broad policy trends or the penetration of EU laws into domestic policy domains. It is therefore mainly concerned with the question whether the regulatory state in Europe can be regarded as a unified (unifying) phenomenon, whether the underlying developments suggest more diversity than similarity, or whether there has been any notable change over time in these dynamics.

Table 2 Studies of Regulation in European Politics

	Organisation	Process
EU-level	EU-level regulatory agencies, role of the European Commission as regulator, modes of regulation	Emergence and evolution of EU-regimes in economic, social and environmental regulation, ‘soft law’ and Open Method of Co-ordination
National level	Design and Operation of national regulatory agencies, modes of regulation	Process of national regulatory change, Impact of EU provisions on national systems (‘Europeanisation’)

In brief, most attention at the EU-level has been paid to processes of regulatory change as well as its organisation. This includes processes of expansion of EU-level competence in economic and social regulation, driven by an interplay between supranational and member state interests (Eberlein and Grande 2005). Furthermore, the strategic role of the European Commission in areas such as competition policy as ‘first supranational policy’ (McGowan and Wilks 1995) or the re-regulation of diverse economic sectors through a process of ‘subterfuge’ (Héritier 1999) have been central to this discussion. In addition, the analysis of different regulatory domains has pointed to differential problem-solving capacities and dynamics across policy domains (see Scharpf 2001), none of which suggesting a regulatory ‘race to the bottom’.

The underlying message of the ‘rise’ of the regulatory state at the EU-level also had a very functionalist logic: change in institutional forms sought to address functional pressures for differentiation. But whereas some aspects of EU-regulation did indeed display the functionalist logic of market integration and spill-overs, in other areas of EU-level regulation, the limits of such a functionalist logic also became evident. One limitation was the emergence of EU-level regulatory agencies that largely had a co-ordinative and informative rather than a traditional ‘command and control’ function (Majone 1997b, 2002). The establishment of agencies of a largely co-ordinative kind – ranging from pharmaceuticals, food safety, racism to railways - with strong member state ‘oversight’ could be seen as a way of building ‘iron triangles’ at the European level, allowing the European Commission to ‘outsource’ certain activities and expand jurisdiction at the European level, offering industries exclusive access, while granting

member states oversight (also Keleman 2002, Demortain 2007).⁹ The other limitation was the constraints of European Union action, either because of lack of capacity, the absence of a variety of policy tools (i.e. the need to resort to regulation instead of a broader toolbox) and of national institutional variety that makes rule ‘harmonisation’ even at a minimum level problematic. As a response to capacity constraints, there was an increasing reliance on networks of national regulators in the areas of competition, communications and energy policy that were not merely to ‘read across’, but also to act as decentralised executive organs of the European Commission. In the case of dealing with national institutional variety, responses involved areas of social and fiscal ‘cooperation’, most prominently through the ‘open method of co-ordination’ (Hodson and Maher 2001, Chalmers and Lodge 2003, Zeitlin 2005, Lodge 2007). What emerged, however, was a diagnosis that neither the ‘traditional’ regulatory approaches nor the ‘new’ and ‘soft’ approaches seemed to provide satisfactory solutions – in terms of national acceptance and co-operation or in terms of improving policy outcomes.

Studies in national regulatory change have largely concluded that the direct impact of the EU has been rather limited. Change, especially its nature and extent, has largely emerged as a result of national political processes (Jordana, Levi-Faur and Puig 2006). The role of EU-developments has been said to constitute largely an additional source of legitimisation for national processes (Knill and Lehmkuhl 2003). This has been most evident in the way in which national regimes have been reformulated to appear compatible with EU provisions, even in those cases where Directives have been prescriptive in terms of institutional forms. Rather than policy transformation, Europeanisation of national rule systems is said to have led to differential policy accommodation among member states (see Schmidt 2001, H  ritier *et al.* 2001). Related are those studies interested in the transposition patterns across member states, given the perception of uneven ‘compliance’ across member states with EU legislation (see Falkner 2005).¹⁰

Similarly, while studies satisfied with diagnosing the existence of regulators and competition authorities have been able to argue that something along the lines of a ‘regulatory state’ has emerged across European countries, other studies have been satisfied in highlighting formal differences in terms of institutional authority, autonomy and responsibilities (see Thatcher 2002, 2005, Gilardi 2002). A separate set of studies has focused on different modes of regulation. Early studies in environmental regulation already pointed to significant differences between Swedish or British ‘co-operative’ and US ‘adversarial’ regulatory relationships that also led to differences in the quality of regulation (see Kelman 1981, Vogel 1986). Less attention (in comparative perspective) has been paid to more fine-grained changes within the regulatory state over recent years. For example, in the UK, there have been moves towards emphasising ‘decentred’ (i.e. co- and self-) regulatory regimes as well as ‘risk-based regulation, accompanied, however, by a greater emphasis on central steering control and ‘punitive’ approaches towards enforcement (Black 2007).

⁹ There are, of course, differences across agencies given the timing of their establishment and the politics of the policy domain.

¹⁰ The European Politics literature has shown very little interest in engaging with the ‘compliance’ literature in regulation with its socio-legal research orientation. Compliance as utilised in European Politics has been largely restricted to the study of formal transposition.

Studies of regulation inside government have also suggested that rather than finding convergence or at least similarity of regulatory developments, there have been significant differences within national systems as well as across states (see Hood et al. 1999, Hood et al. 2004). A more recent interest has focused on the growth of 'regulatory review' mechanisms across national states ('regulatory impact assessments') as well as their utilisation at the EU level (Radaelli 2004), again a development which parallels interest in the review activities of other transnational organisations, such as the OECD (see Schäfer 2004, Lodge 2005).

Four broad implications for understanding the nature of the state in Europe emerge from this brief review. One is that European states have responded in differential ways to what have been diagnosed as common challenges. The allocation of regulatory authority has witnessed both a move towards the EU-level and 'sideways' to non-majoritarian institutions. However, the degree to which these shifts have taken and are taking place depends on sectors and on national experiences. The second implication is that far from a 'hollowing out' or 'decentring' of the state, the regulatory state is said to have re-arranged and not challenged or weakened the centrality of the European national state in the regulation of economic and social activities. The third is that far from a mere reliance on hierarchy, a diversity of modes of regulation has been and is being employed both at the EU and the national level. Finally, the fourth implication is that the EU-level literature has pointed to substantial problem-solving capacities in regulation across the EU, but also to their limitations, whether in terms of 'discretionary' forms of transposition of EU provisions or in terms of adjusting 'voluntarily' in the face of high national electoral costs of policy change. In addition, the nature of responses across national systems to EU requirements has been shown to be less related to 'goodness of fit', but to a wider set of factors akin to more theoretically grounded studies of system responses to environmental turbulence.

However, has the focus on regulation added any analytical contribution to the study of European Politics? As already noted, in the 2002 WEP special issue on 'non-majoritarian institutions', Mark Pollack suggested that in the study of delegation Europeanists were 'again' in a position to learn from the 'Americanists' (Pollack 2002). So has there been a dominant interest in coupling developments in regulation to approaches drawn from North American political science in general, or regulation in particular?

The seminal work by Majone arguably qualifies most strongly for the claim that the turn towards the regulatory state represented a direct drawing from American social science, even when leaving references to and implications for theories of democracy aside (see Moran 2003). As already noted, the importance attached to credible commitment draws on approaches emphasising strategic action within rule systems. It was therefore logical that the (US-focused) delegation literature, with its strong currents in the 'congressional dominance/abdication' debate, was taken up in the study of agencies across European states (see Gilardi 2002, Thatcher 2002). More broadly, the delegation approach was also utilised to study the 'delegation' of policy authority by member states to the European Commission as well as the control mechanisms that were said to have been deployed by member states to limit the discretion of the 'agent', the European Commission. While certainly worthwhile as an exercise in comparison, it is nevertheless important to put 'principals and agents' in

their place. National regulatory agencies at the national level and the European Commission are hardly ‘agents’ in the strict sense, but have a fiduciary trusteeship function (Majone 2005: 74-82). In other words, the role is exactly not that of an agent that is at the beck and call of its principal(s) (see also Hood and Lodge 2006: chapter 2).

As noted above, the dynamics that are said to have facilitated the move towards the regulatory state at the EU-level could also be associated with a functionalist logic – and the developments at the EU-level shows signs both of the logic of functionalist integration and its limitations.¹¹ Similarly, it could be argued that the literature on the emergence of EU-level regulatory regimes, such as for telecommunications and electricity, have been shaped by traditional (North American) debates in the European Integration literature over the sources for ‘integration’, namely those neo-functionalists with their claims of technologies creating spill-over pressures, the growth of European companies and the pressures of supranational authorities, or those liberal intergovernmentalists with their emphasis on national policy preferences (see Thatcher 2001). Cross-sectoral comparison has moved beyond such dichotomies. For example, Susanne Schmidt (1998) has shown how actor-centred institutionalism highlights the sector-specific conditions in which various actors are provided with different resources, motives and opportunities to initiate and shape regulatory change.

While in the above two cases the argument that the study of European Politics has been shaped by Americanists could receive some qualified support, there has been a European ‘rejection’ of the early (US-) regulation literature with its strong emphasis on the importance of private interests ‘capturing’ regulation in their own interest – either fully (Stigler 1971) or to some extent (Pelzman 1989) at the point of inception, or over time (see Bernstein 1955).¹² This absence of an interest in ‘capture’ is puzzling, even if only as a claim to be investigated (and dismissed) given the diagnosed close involvement of concentrated industry interests in the emergence of EU agencies.

One distinct European contribution to the study of regulation has been the concept of ‘regulatory space’ (Hancher and Moran 1989). While this term in itself is problematic, it nevertheless constitutes an important contribution in a number of senses. This variant of historical institutional analysis acknowledges the historical evolution and setting of regulation, in particular the distribution of regulatory authority across state, para-state and private actors. Rather than focusing on regulatory agencies, the study of regulation turns towards the distribution and fragmentation of regulatory authority across a diversity of actors. Such a perspective is therefore also sensitive to what public lawyers have defined as the essential ‘polycentric’ nature of regulatory regimes within the regulatory state, characterised by hybrid regimes consisting of state and non-state actors and complex, often multi-level interaction patterns (Black 2007). In addition, this ‘lens’ highlights the importance of being sensitive to national (and sectoral) difference. Given the historical embeddedness of regulation in national political economies, arguments about the spread of ‘regulation’ across European states should therefore be treated with caution. As Marian Döhler (2002) has shown,

¹¹ ‘...the practical case for delegating rulemaking powers to expert agencies has proved to be overwhelming’ (Majone 2005: 83).

¹² This view of a dominant interest capturing economic regulation has been qualified (see Wilson 1980) and challenged (Eisner 2000).

while the language of ‘regulation’ may have travelled across national systems and regulatory agencies may have emerged, the way these are incorporated into national administrative law contexts leads to considerable formal differences, let alone differences in informal understandings that govern relationships within the ‘regulatory space’. Indeed, the way in which regulatory authorities were conceived and incorporated into national policy-making styles varied greatly, for example whether these agencies were conceived as part of a tradition within the policy domain or whether they were inspired by wider ideas regarding the appropriate organisation of the state in running parts of economic policy. Observers such as Michael Moran have therefore diagnosed an ‘incomplete penetration’ of the logic of regulatory state into the British policy-making process, leading to break-downs. Similarly, others have noted a hybridisation between the ‘old’ and the ‘new’; for example, in terms of rewards, in Britain traditional ‘honours’ were also part of the rations for the new breed of economic regulators, and not just for the traditional ‘Whitehall’ bureaucrats (Hood and Lodge 2006: 73). Given national variation, it is therefore not surprising that studies of ‘Europeanisation’ have noted the absence of immediate or inherent ‘convergence’ in policy approaches across policy domains, with Europeanisation mainly affecting the way in which domestic coalitions struggle over domestic policy change through normative support; at the same time, there has been some evidence of a growing presence of European-wide regulatory ‘communities’ that pursue a distinct regulatory ‘conversation’.

Studies of regulation across European states employing Grid-group cultural theory have also stressed the importance of moving beyond first-level approximations of the ‘regulatory state’ and its institutions (see Hood *et al.* 1999, 2004, Lodge and Wegerich 2005a, 2005b). Applying this particular analytical framework to the cross-sectoral and cross-national study of regulation ‘inside’ government, adds at least two important additions to the study of regulation and the regulatory state, first, that the study of formal arrangements says very little about the way in which regulation operates; second, that such studies which are sensitive to sectoral and national context present considerable challenges to widely held national stereotypes in public administration and regulation (see Hood 2004: 187-193).

In conclusion, the analytical contribution of the European Politics literature to the field of regulation has been far more sophisticated than a mere cross-reading from the field of ‘delegation studies’ in the US, not only because of difficulties of transplanting US-centric approaches to regulatory regimes across European states. More positively, given the interest in investigating whether contemporary macro-trends have triggered increased degrees of commonality or continuous difference has established not only the grounds for a careful analysis of casual mechanisms that affect regulatory change, but have also increased the sensitivity to the national specificity of regulation and the regulatory state. Thus, regulation may therefore be regarded as similar activities divided by the same language. This may arguably not provide the grounds for parsimony or accommodation to contemporary hegemony in social science, but paves the way for a more helpful analysis of regulation as an empirical phenomenon.

Dilemmas of the regulatory state

This paper has so far traced the origins of the contemporary interest in regulation as well as highlighted some dominant analytical and empirical themes that justify and stimulate this interest. The regulatory state is not only of interest as an empirical site

for exploration, but also points to significant dilemmas affecting the nature of the European state. Again without seeking to explore this issue in any exhaustive way (and avoiding the long list of regulatory approaches that predict failure (see Lodge 2002b)), this section explores three dilemmas of the regulatory state which not only point to sources of policy instability, but more fundamentally highlight crucial issues affecting the state in contemporary Europe.

Legitimacy of state institutions is not only normatively desirable, but is also crucial for the effective and efficient use of administrative resources. Regulatory agencies, given their non-majoritarian nature, derive their legitimacy through the efficient achievement of the desired and prescribed states of the world – whether it is the control of economic monopolies, the safeguarding of the functioning of financial markets or the limitation of environmental pollution or health & safety-related incidents. In contrast, policy choices as to the nature and structure of the service, in terms of the allocation of responsibilities and financing, for example, should, so the argument goes, be decided by those who can be held to account for their decisions, whether in parliament or in elections. Therefore, regulatory agencies should have a single focus rather than be forced to undertake policy choices and engage in trade-offs (Foster 1992). At least two counter-arguments suggest that such a view of narrow institutional focus is at best problematic, thereby creating dilemmas. One is that life is never that easy and even decisions that appear to be solely concerned with economic regulation – such as the setting of prices – inherently require value-choices as to whether to prefer Type I or Type II errors and such choices also have far-reaching social (and hence redistributive) implications. The view of regulatory decisions being straightforward and ‘narrow’ becomes even less persuasive in the context of ‘new social risk’ regulatory arenas. The other counter-argument is that few regulatory agencies in Europe can be said to have a single and narrow focus. Instead, statutory obligations, imposed at the time of their inception as well as through a seemingly continual process of ‘extensions’, have increasingly come to resemble a ‘smorgasbord’ of regulatory values, ranging, in the case of British energy regulator, across those of economic efficiency (‘competition’), social welfare, security of supply and environmental protection. In other words, regulatory agencies have become policy-making departments in all but name, but without the ‘normal’ legitimating devices associated with liberal democracy.

The second dilemma emerges from the political dynamics of the regulatory process, which make the granting of autonomy from direct political interest an at best fragile construction. According to the naïve story of the conception of regulatory regimes, the initial regulatory bargain is something like this: politicians grant regulators full authority over specified decisions and promise more or less complete intergenerational ‘abdication’. In exchange, they derive benefits from signalling the solution of the commitment problem to those constituents benefiting from this regulatory regime. If one accepts this characterisation of the bargain, both sides are likely to experience cheating or suspect cheating by other parties’ behaviour. In the case of the British railways in the early 2000s, this included the refusal of the British government to indicate what subsidy levels they were willing to provide for the continuation of services and at what level – thereby reducing the ability of the regulator to conduct a rate review of the railway infrastructure. Politicians then vilified subsequent regulatory decisions as unreasonable regulatory decision-making, leading to new legislation that significantly reduced the decision-space of the

regulator. Earlier, decisions surrounding the bankrupting of the then railway infrastructure provider, Railtrack, represented for many the collapse of the idea of an autonomous regulator (see also Moran 2003:115-9). Apart from occasions of conflict, alterations to the initial legislation also suggest a continued politicisation of regulation. In the UK, changes in legislation allowed for the merging of regulatory bodies and the move from ‘personal’ to ‘collective’ organisational leadership. While justifications for these policy trends were functional (‘convergence’ and ‘avoiding loose cannons’), these changes pointed to inherent instabilities within the organisation of the regulatory state per se, while also offering another encore of eternal argumentation across administrative doctrines about ‘how to’ organise administrative units. In Britain, the selection of regulators was seen to reflect many tendencies of the previous age of public ownership, namely the selection not necessarily on the basis of party membership, but on the basis of broad policy congruence (and being a ‘good chap’). In other countries, too, the idea of ‘independent regulators’ has either never really been embraced or has witnessed considerable neutering.¹³ This is not to suggest that regulatory agencies do not matter or play no meaningful role in the processes of modern European states, but rather that they neither represent ‘independence’ or autonomy’ nor do they represent a device that has depoliticised particular policy domains; in contrast, they have arguably allowed for increased complication and complexification of policy-making and thus politicisation.¹⁴

The third dilemma relates to the modern adage ‘policies as their own cause’, usually attributed to Aaron Wildavsky (1980: 62). In other words, self-exciting interactive effects do not facilitate mutual reinforcement, but rather contradiction and self-destruction. Regulation is about the achievement of the values of resilience, efficiency and equity and inherent trade-offs between these three values. And these decisions also take place in an environment that is not stable – systems inherently self-degrade. The past two decades have seen a trend towards liberalisation and ‘economic’ regulation that to some extent also contained components to address issues of ‘equity’. However, as a consequence, ‘resilience’ is said to have been neglected. Dieter Helm (2004), for example, has argued that the emphasis on efficiency gains through the ‘price cap’ (RPI-X) has encouraged so-called asset sweating at the expense of investment in the UK. Such effects are inherent in particular policy choices. In addition, given that the age of the regulatory state is characterised by decentralisation, in the sense of fragmented private providers offering services with the key government involvement being undertaken by a supposedly ‘autonomous’ economic regulator (raising issues noted above), then very few tools are left in the arsenal of governments to affect comprehensive policy decisions. This may be a good thing given what is known about the dysfunctionality of large-scale planning, but it is arguably nevertheless costly to co-ordinate or incentivise autonomous actors in the absence of elements of hierarchical authority. Similarly, in the area of food safety, the existence of competing logics, those of risk and of anxiety, was said to place

¹³ In other words, the key problem has been the inherent trade-off between commitment and flexibility, or the reduced commitment and decision-making costs that politicians incur from establishing regulatory authorities and the increased ‘agency costs’ of monitoring and control.

¹⁴ At the time of writing, the Spanish stock market regulator, Manuel Conthe, resigned following calls for his resignation by the Spanish government over his conduct over a bid for the Spanish utility Endesa. Conthe in turn accused the Spanish government of eroding regulatory independence (‘Spain’s market regulator resigns over Endesa bid’ *Financial Times*, 25 April 2007, p. 8 (London edition)).

irresolvable problems at the door of EU-level food safety regulatory decision-making (Chalmers 2005).

This section did not seek to explore whether regulation can ever be complete in the sense of obtaining desired states of the world over time – and neither the ‘high reliability systems’ nor the ‘normal accident’ schools of organisation would suggest that the existence of rule-systems organised through an agency would achieve policy success in themselves. Nor did it point to empirical trends that suggest policy failure, such as the fact that despite increasing amounts of EU environmental legislation, the European environment has deteriorated. This section has pointed merely to the dilemmas arising from the (state-centric view of the) institutional architecture of the regulatory state, whether in terms of implications for the democratic nature of the state, the impossibility of obtaining technocratic dreams of rational control by allowing differentiation of institutional forms to follow the process of differentiation of social processes, or the inevitability of dealing with side-effects and problems in matching political demands for flexibility with the functional demands for non-discretion. Given the national specificity in which the infrastructure of the contemporary regulatory state has been adopted and adapted across states, the above dynamics are therefore both universal as well as particular to national states at the same time.

Looking forward – fading away, plodding along, or rejuvenation?

Although issues of ‘control’ and the organisation of state-owned enterprises had been well-established in the field of public administration (see Robson 1962), the terms ‘regulation’ and ‘regulatory state’ hardly featured in the study of European Politics thirty years ago. The language of regulation was reserved for students of US public policy. By 2007, regulation is firmly embedded across Europe. However, would an observer in 2037 still consider regulation an important topic, or is the area of regulation, especially in the area of European Politics, about to go through a terminal mid-life crisis? The rest of this paper considers three potential scenarios, ‘fading away’, ‘plodding along’, and ‘rejuvenation’.

A future of ‘fading away’ and eventual disappearance is not uncommon in the social sciences (and among social scientists). Concepts and terminologies are regularly ‘invented’, witness a rapid expansion in terms of academic interest and eventual forgetting, once academic interest has moved on to the next conceptual fad. Alternatively, social concerns may change suddenly or over time, therefore making the study of any particular field less relevant. There are at least two reasons why regulation may fade away from academic interest. One is the lack of a definition and therefore of a clear boundary. While boundary issues are characteristic of (intellectual) adolescence, the traditional definition of regulation as ‘the sustained and focused control exercised by a public authority over activities valued by the community’ (as defined by Selznick 1985: 363) is only of limited value in the context of European Politics, given varieties of ‘public authority’ ranging from the private, associational, the national state to the supranational and international. Nor does it address questions regarding decision-making rules establishing what is valued by the ‘community’, and problems arising from cross-border issues. Thus, while traditional definitions provide the literature with many of the initial points of departure for analysis, more contemporary definitions relying on ‘intentional use of authority to affect behaviour of a different party according to set standards, involving instruments

of information-gathering and behaviour modification' (Black 2002), risk extending the field of the regulation into the endless. One further but related criticism that could be launched at most of the literature on regulatory change in the context of European Politics is that the meaning of the texts would hardly change, if the word 'policy' were used instead of 'regulation'. Similarly, 'regulation' and 'governance' could also be often used interchangeably.

A related reason for a potential fading away from academic attention is exhaustion of intellectual effort. Regulation and 'regulatory state' have been widely utilised to apply frameworks developed elsewhere and therefore have been used as 'dependent variables'. Therefore, a distinct 'regulation' lens has, as yet, not developed – neither has there been a significant debate regarding the nature of the 'state' in the age of the 'regulatory state'. This is not problematic as long as the field is relatively focused, and allows for linkages to other key intellectual debates. However, given the uncertain boundaries of Regulation, the inherent risk is that regulation becomes the study of 'everything', and therefore fades away from scholarly attention.

The above arguments assumed a stable 'applied' regulation background. But should those policy concerns as expressed in the earlier section on dilemmas become more acute, then the language of regulation as well as the organisation of regulatory activities may witness considerable change, thereby leading to a displacement of academic interest over time. However, even if such processes were to occur, it is unlikely that 'regulation' as a policy activity in the wider sense, rather than as the institutional arrangements of the 'regulatory state', will fade away because of social irrelevance. Issues of control over economic and state activities (such as energy and prisons) go to the heart of the nature of the state and its capacities and are unlikely to disappear. Questions of how to deal with emerging technologies require regulatory answers. In short, domains under consideration may change, the language of regulation may move on and the organisational infrastructure of the regulatory state may witness re-arrangement, but it is unlikely that the underlying issues and questions will disappear, especially in an age where we are supposedly witnessing shifts towards self- and co-regulation in some aspects (such as the environment) and enhanced 'hierarchical' control in others (for example, in the area of justice and civil liberties).¹⁵

Under the scenario of 'plodding along', interest in regulation expands towards new fields and more cases. There are substantial areas in European Politics that are left to the Regulation-interested student to explore, in particular in the historical, cross-sectoral and cross-national perspective. And it is unlikely, if only some aspects of the 'dilemmas' noted above were to occur, that the field will be short of empirical stories to tell, whether in the areas of the regulation of utility networks, social regulation or those of risk management. Such a future of 'plodding along' (typical of 'normal science') with studies exploring ever more niches that qualify as 'regulation' comes at the risk of increasing marginalisation (through 'niche-isation') and the risk of intellectual overextension and therefore exhaustion. By 2037 we may know more and more about less and less.

¹⁵ It is also hardly imaginable that the dream of 'rational control' will fade away.

Under the scenario of rejuvenation, Regulation as a field of study and as a contributor to the field of study of European and Comparative Politics would flourish over the next 30 years. Predicting such a future risks suffering a fate similar to that of highly esteemed (and usually well-enumerated) prophets of everlasting dot-com and share price booms. Nearly a decade ago, Baldwin, Scott and Hood (1998) argued that such a future could lie in a stronger focus on the language, cultures and side-effects of regulation. Apart from some studies (applying cultural theory), such a shift has not occurred, especially not in the pages of comparative politics journals. There is still need for an improved understanding of the rhetoric of regulation, its unintended consequences and its underlying cultures. These require advanced methodologies (despite these issues being long-standing concerns).¹⁶ Such concerns are not necessarily traditional, placing the field of regulation closer to other aspects of comparative public administration and public policy. Analytically, rejuvenation is also about moving beyond the sterile interest in formal regulatory change and regulatory institutions. One need not sign up to Luhmannesque autopoiesis or Foulcauldian analysis to investigate regulation as a system of control that cuts across public and private domains, that is decentralised and that operates in an organisationally fragmented way. Such an analysis, in particular in comparative European perspective, is challenging, but arguably more likely to rejuvenate the study of Regulation than additional instalments of principal-agent-‘theory’ based illuminations of formal regulatory agencies. If these issues were placed at the heart of European Politics, the study of regulation in Europe could become leading, both empirically as well as analytically.

Empirically, rejuvenation would provide for advances in the study of EU and national level regulation, different understandings of risk regulation in various domains and countries, competing logics within regulatory regimes as well as the evolution of regulatory regimes over time, in particular as we are said to move from an era of liberalisation and emphasis in efficiency towards an era of increased concern about resilience. Labour mobility is challenging established national approaches towards social regulation. In the area of risk, ongoing debates regarding the ‘precautionary principle’, popular distrust in new technologies and scientific applications to everyday things, such as food or human reproduction, have established policy environments that is crystallising many of the above mentioned dilemmas of the regulatory state. This field for future empirical studies allows for considerable cross-fertilisation between research in regulation and other fields in comparative European politics. Regulation in Europe is inherently about the politics of interest groups, societal values, and demand and supply of EU regulation across domains. Regulation is about the capacity of nation-states to regulate their economy and their society (‘tactics of government’) and issues regarding the type of regimes that emerge at the EU-level and at the national level. Issues such GM foods have triggered the search for alternative decision-making processes that relate to themes such as new social movement as well as alternative forms of representative politics.

This conclusion avoids any firm predictions as to the likely future of the study of regulation and the regulatory state. However, the fundamental issues that are at the heart of the study of regulation and the regulatory state are central to the

¹⁶ See, for example, Posner’s provocative critique of the legal discipline (in the US) in being unable to deal with natural science complications arising from modern policy issues (Posner 2004).

understanding of the state, its relationship not only to business and its citizens, but also about the state's often fragmented distribution of coercive authority, while also highlighting the importance of supranational sources of regulation. Similarly, the issue of control over economic, social or technological activities is not something that is going to fade away. As a term, regulation may go out of fashion, but its central concern has been and remains fundamental to the very understanding of the state in Europe and therefore of politics in Europe.

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